[Cite as *State v. Slone*, 2015-Ohio-4265.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
JOHN A. SLONE	:	Case No. 14CA84
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2014-CR-211
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	October 9, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DANIEL M. ROGERS 38 South Park Street Mansfield, OH 44902	RANDALL E. FRY 10 West Newlon Place Mansfield, OH 44902

Farmer, J.

{¶1} On April 10, 2014, the Richland County Grand Jury indicted appellant, John Slone, on eight counts of rape in violation of R.C. 2907.02 and eight counts of sexual battery in violation of R.C. 2907.03. Said charges arose from incidents over the course of two years involving appellant and a minor, age fifteen to seventeen at the time.

{¶2} A jury trial commenced on September 25, 2014. The jury found appellant guilty of five of the rape counts and all eight of the sexual battery counts. By sentencing entry filed October 7, 2014, the trial court sentenced appellant to an aggregate term of thirty-five years in prison, and classified him as a Tier III sexual offender.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO DISMISS FOR THE REASON THAT THE APPELLANT'S RIGHT TO SPEEDY TRIAL WAS VIOLATED."

II

{¶5} "THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR A CRIMINAL RULE 29 MOTION FOR ACQUITTAL."

III

{¶6} "THE TRIAL COURT ERRED IN NOT GRANTING THE MOTION IN LIMINE FILED BY THE APPELLANT'S ATTORNEY AS IT PERTAINS TO THE EVIDENCE RELATED TO THE RECORDED POLICE INTERROGATIONS."

IV

{¶7} "THE APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS THE APPELLANT' (SIC) AS THE APPELLANT'S ATTORNEY DID NOT FILE A MOTION TO SUPPRESS TO KEEP THE CONTROLLED PHONE CALL MADE BY THE VICTIM TO THE APPELLANT FROM THE HEARING OF THE JURY."

I

{¶8} Appellant claims the trial court erred in denying his motion to dismiss for speedy trial violations. We disagree.

{¶9} R.C. 2945.71 governs time within which hearing or trial must be held. Subsection (C)(2) states: "A person against whom a charge of felony is pending: [s]hall be brought to trial within two hundred seventy days after the person's arrest." Subsection (E) states: "For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section."

{¶10} In *Barker v. Wingo,* 407 U.S. 514, 530 (1972), the United States Supreme Court set forth a four-part test to determine whether the state has violated an accused's right to a speedy trial. The four factors include (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. The *Barker* court at 532 explained prejudice as follows:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.***Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. (Footnote omitted.)

{¶11} Appellant filed his motion to dismiss for speedy trial violations on September 25, 2014, the day his jury trial began. Although there is no judgment entry of the trial court overruling the motion, the trial commenced and both appellant and appellee agree the motion was overruled.

{¶12} Appellant was incarcerated 192 days or 102 days longer than the statutory limit. However, various events tolled the time and appellant concedes them, except for the trial court's August 15, 2014 order which continued the final trial date:

> It is hereby ordered that the jury trial of this case is continued form August 14, 2014, because the case of *State of Ohio v. Sherrick Hunter,* Case No. 14 CR 58 D continued to trial this date, and is rescheduled to Sept 25 at 9:00 a.m. Time is tolled for speedy trial purposes until this matter can be tried.

{¶13} In *State v. Lee,* 48 Ohio St.2d 208, 209 (1976), the Supreme Court of Ohio stated the following:

> The record of the trial court must in some manner affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose. Mere entries by the trial court will ordinarily not suffice, except when the reasonableness of the continuance cannot be seriously questioned. Although this burden is contrary to the presumption of regularity generally accorded to trial proceedings, it appears necessary to carry out the purpose of the speedy-trial statutes.

{¶14} The trial date had been set for August 14, 2015. On August 7, 2015, appellant filed a motion in limine. A hearing on the motion in limine was held on August 13, 2015. During this hearing, the issue of a needed continuance was addressed on the record without any objection by trial counsel (August 13, 2014 T. at 11-12):

> THE COURT: Thank you. Anything else we can talk about productively?
>
> MR. UHRICH: Only that I heard some hallway chatter, I'm not sure about our status for tomorrow, I assumed we were first up, and I don't know if that's changed or not.
>
> THE COURT: You're not first up.

MR. BISHOP: No, they are not first up. That status has changed. As you know we were anticipating having to dismiss State versus Sherrick Hunter because we couldn't find the victim. We have now found him. He came in and met with me yesterday, so we contacted the Court and we requested that they not grant that motion to dismiss. We're trying to get ready to go forward on Sherrick Hunter tomorrow.

THE COURT: That fellow has been in jail since January?

MR. BISHOP: January 19th.

THE COURT: His case has to go first.

MR. UHRICH: I understand, Your Honor. I just want to plan my day.

THE COURT: You are released for tomorrow.

MR. UHRICH: Thank you. You will let me know what the new trial date is?

THE COURT: Yes.

MR. UHRICH: Thank you, Your Honor.

Thereupon, the hearing concluded.

{¶15} Docket congestion is not an unreasonable reason for a delay. *Lee, supra.* We conclude the August 15, 2014 order, although time stamped after the scheduled August 14, 2014 trial date, was sufficient to toll the speedy trial statute. We do not find any prejudice to appellant.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims the trial court erred in denying his Crim.R. 29 motion for acquittal as there was insufficient evidence of times and dates of when the incidents occurred and everything was very vague. We disagree.

{¶18} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶19} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman,* 55 Ohio St.2d 261 (1978), syllabus: "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶20} Appellant was indicted on eight counts of rape, convicted of five, in violation of R.C. 2907.02(A)(2) which states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Appellant was also indicted on eight counts of sexual battery,

convicted of all eight, in violation of R.C. 2907.03(A)(5) which states: "No person shall engage in sexual conduct with another, not the spouse of the offender, when***[t]he offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person." "Sexual conduct" is defined in R.C. 2907.01(A) as:

> [V]aginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

{¶21} The counts alleged the incidents occurred between April 1, 2011 and June 1, 2013.

{¶22} The victim testified to numerous different scenarios of sexual conduct. Most of the incidents occurred upstairs in the bedrooms of appellant or the victim and involved oral and anal sex and fondling. From our review of the evidence, there are at a minimum five incidents of forcible rape from April 2011 to June 2011 and a minimum of eight incidents of sexual battery from April 2011 to June 2013. T. at 187-211. Although oral and anal sex continued to occur after June 2011, the victim "[j]ust went along with it.***I didn't put up a fight." T. at 210. It was up to the jury to determine if the victim "went along with it" on other occasions under the "threat of force." The incidents of

sexual conduct occurred two to three times a week from April 2011 through June 2013. T. at 200, 207-208, 210, 242-243.

{¶23} Appellant made tacit admissions on a controlled telephone call with the victim (" 'I'm sorry for the sex' ") and during his recorded interview with the police (it was consensual and it happened less than ten times). T. at 238, 383, 389-390.

{¶24} Upon review, we find the trial court did not err in denying the Crim.R. 29 motion as there was sufficient credible evidence of at least five incidents of forcible rape with the possibility of additional rapes under the "threat of force" and at least eight incidents of sexual battery.

{¶25} Assignment of Error II is denied.

III

{¶26} Appellant claims the trial court erred in denying his motion in limine seeking to bar appellee from introducing any evidence related to his recorded police interrogation because the recording was incomplete and the playing of the partial interrogation would be prejudicial. We disagree.

{¶27} The granting of a motion in limine lies in a trial court's sound discretion. *State v. Grubb,* 28 Ohio St.3d 199 (1986). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶28} A hearing on the motion in limine was held on August 13, 2104. During the hearing, defense counsel argued the primary concern was that the partial recording could not give the jury a full understanding of the tone of the interview. August 13, 2014

T. at 3-4, 7-8. Defense counsel argued some of the recorded statements could have a different interpretation if heard in the context of the entire interrogation. *Id.*

{¶29} By order filed August 15, 2014, the trial court denied the motion, finding the following:

> The defendant's first motion asks to exclude the recorded portion of the defendant's statement to police because the recording gives an unfair representation of the entire conversation between the parties. Both the officer who conducted the interview and the defendant will have the opportunity to testify what defendant said during the interview, and explain why the entire interview is not recorded. The defendant's statements during the interview are admissible under Ev.R. 801(D)(2), whether audio-recorded or not, and this motion in limine is overruled.

{¶30} At trial, the police officer explained the partial recording and why the entire interrogation was not recorded. T. at 390-392. Defense counsel cross-examined the officer on the issue. T. at 396-399. During his own testimony, appellant explained to the jury the nature and scope of the interview. T. at 505-509.

{¶31} Upon review, given the testimony of the officer and appellant at trial, we do not find an abuse of discretion by the trial court in permitting the playing of the partial interrogation to the jury.

{¶32} Assignment of Error III is denied.

IV

{¶33} Appellant claims his trial counsel was ineffective in failing to file a motion to suppress a police-controlled telephone call between him and the victim. Appellant claims his statements made during the call were tantamount to a confession and a motion to suppress would have been successful. We disagree.

{¶34} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶35} Prior to opening statements, defense counsel made a motion to exclude the recording of the controlled telephone call, claiming it constituted a coerced

confession because the victim was acting as an agent for the state. T. at 122-124. The trial court denied the motion. T. at 126-127.

{¶36} As discussed in Assignment of Error II, there was a tactic admission by appellant during the telephone call. He stated " 'I'm sorry for the sex' " after having been prompted to respond to the victim. T. at 238.

{¶37} Appellant argues a motion to suppress would have been granted had it been filed, thereby meeting the prejudice prong of *Bradley, supra*. However, assuming arguendo that defense counsel should have filed the motion, appellant cannot establish there existed "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Even if the recording would have been excluded, compelling evidence still existed to convict appellant. Besides the testimony of the victim, appellant's own admissions to the police defeat the undue prejudice standard. Appellant admitted to engaging in consensual sex with the victim and that it occurred less than ten times. T. at 389-390.

{¶38} Upon review, we do not find undue prejudice to appellant and therefore, do not find any ineffective assistance of counsel in failing to file a motion to suppress to exclude the recording of the controlled telephone call.

{¶39} Assignment of Error IV is denied.

{¶40} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

SGF/sg